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In the Supreme Court of the United States

OCTOBER TERM, 1984

SOUTHWEST SECURITY EQUIPMENT CORPORATION,
PETITIONER
v.
NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of this case, the court of appeals properly held that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing, upon expiration of the contract between petitioner and the Union, to honor the hiring hall referral arrangement provided for in the contract.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-41a) is reported at 736 F.2d 1332. The decision and order of the National Labor Relations Board (Pet. App. 43a-109a), including the decision of the administrative law judge (Pet. App. 57a-109a), are reported at 262 N.L.R.B. 665.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 1984. A petition for rehearing was denied on October 12, 1984 (Pet. App. 111a-112a). The petition for a writ of certiorari was filed on January 7, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. 3-7.

STATEMENT

1. Petitioner sells, installs and services bank security equipment. In October 1979, the International Association of Bridge, Structural, Reinforcing and Ornamental Iron Workers, Local 75, AFL-CIO (the Union)[1] was certified as the exclusive bargaining representative for all installers working out of petitioner's Phoenix, Arizona facility (Pet. App. 5a-6a). In April 1980, petitioner signed the Union's master agreement with the Arizona Field Erectors Association, a multi-employer group (*id.* at 6a, 64a-65a). That agreement, which was effective from August 1, 1977, through July 1, 1980, required petitioner to hire employees for bargaining unit work through the Union's hiring hall and to make payments on their behalf to various union benefit funds (*id.* at 68a-70a). The hiring hall section of the master agreement provided (*id.* at 88a, 117a-118a; GCX 5, at 8)[2]:

> In order to maintain an efficient system of production in the industry[,] to provide for an orderly procedure for the referral of applicants for employment, and to preserve the legitimate interests of employees in their employment, the Employers and the Union agree that when an individual Employer requires Iron Workers to perform any work covered by this Agreement, he shall hire applicants for employment to perform such work, in accordance with this Agreement.
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> * * * * *

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[1]The Union intervened in the court of appeals and is a respondent in this Court.

[2]"GCX" refers to the exhibits of the General Counsel introduced at the hearing before the administrative law judge. "Tr." refers to the transcript of that hearing.

> (a) All employees required by the Employer shall be furnished and referred by the union to the Employer off the hiring lists.

Pursuant to the agreement's provisions, employees were placed on the hiring list and referred for work according to their qualifications, experience, including previous experience with employers covered by the master agreement, and according to the dates on which they registered with the hiring hall (Pet. App. 118a-127a; GCX 5, at 8-12). The agreement provided that applicants would be referred through the hiring hall without regard to their membership or nonmembership in the Union (Pet. App. 120a; GCX 5, at 9).

Between April 22 and May 16, 1980, petitioner requested, and the Union referred, eight employees from the hiring hall lists, including at least four employees who had been working for petitioner before the contract with the Union was signed. Petitioner filed a report for May 1980 with the benefit funds specified in the master agreement, but did not make any payments to the funds with respect to covered employees. Pet. App. 6a-7a, 70a-71a; Tr. 168; GCX 7a-7i, 8(a). Early in May, before the agreement's expiration, petitioner began obtaining employees from sources other than the hiring hall to perform work previously done by employees referred through the hiring hall, and after May 16, 1980 petitioner ceased requesting any referrals from the Union. All but one of the employees previously referred through the hiring hall were thereby laid off. Only one employee, who had been referred earlier and worked until June 26, 1980, was listed on petitioner's June report to the benefit fund trustees. Pet. App. 71a-72a; Tr. 18-20, 31-32, 52, 156, 161-168, 212, 252; GCX 8(b), 13, at 4-5. The Union

subsequently filed unfair labor practice charges with the Board.[3]

2. a. The administrative law judge (ALJ) concluded that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by refusing to abide by the contractual provision governing hiring hall referrals during the term of the agreement and following its expiration in July 1980 (Pet. App. 57a-109a). Reasoning that the hiring hall provision constituted a term and condition of employment that survived expiration of the collective bargaining agreement, the ALJ determined that petitioner was not free to abrogate it absent a new agreement or bargaining impasse (*id.* at 86a-87a). The ALJ noted (*id.* at 87a-88a) that referral "is a mandatory subject of bargaining generally of significant importance to employees in a covered industry, for by setting hiring priority standards, it directly affects their opportunities for continued employment in the industry," and relied (*id.* at 86a-87a) by analogy on the Board's decision in *American Sink Top & Cabinet Co.*, 242 N.L.R.B. 408 (1979), in which the Board held that, in view of the parties' presumed intent, a contractual arbitration provision survived the contract's expiration where the dispute was over an obligation arguably created by the expired agreement.

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[3]On May 15, 1980, the Union sent a letter to petitioner stating that it intended to file a grievance under the master agreement because petitioner had informed the Union that it would no longer seek employees referred through the hiring hall to perform bargaining unit work. Following petitioner's failure to respond to this letter, the employers' association issued a decision on the Union's grievance on July 2, 1980, finding that petitioner had violated the provisions of the master agreement "relating to hiring, payment of wages, payment of benefits, and adjustment of grievance and dispute," and stating that "the Union is free to seek whatever remedy through civil litigation or administrative agency." Pet. App. 72a-78a; GCX 14.

b. The Board adopted pro forma the conclusion of the ALJ that petitioner's refusal to abide by the hiring hall referral provision violated Section 8(a)(5) and (1) (Pet. App. 43a-45a). Because the Board determined that petitioner had not preserved for review its objection to the survival of the hiring hall provision following expiration of the contract, the Board adopted the ALJ's conclusion without addressing the merits of the ALJ's analysis (*id.* at 45a n.1).[4] The Board ordered petitioner to cease and desist from the unfair labor practices found, to bargain with the Union, to rescind all unilateral changes made in the terms and conditions of employment set by the referral, benefit, and grievance and arbitration provisions of the contract, and to give retroactive effect to those provisions. The Board's order also required petitioner to make whole all individuals who suffered losses by reason of its failure to comply with the hiring hall provisions and to make all contributions to the benefit funds that would have been made absent petitioner's unlawful discontinuance of those payments. *Id.* at 46a-55a.

3. The court of appeals enforced the Board's order (Pet. App. 2a-41a). Although a majority of the panel rejected the Board's conclusion that petitioner had failed to file timely exceptions to the ALJ's ruling with respect to the hiring hall provision (*id.* at 12a-20a),[5] the court held that the hiring hall

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[4]For the same reason, the Board adopted pro forma the ALJ's conclusion that petitioner violated Section 8(a)(5) and (1) by failing, following expiration of the contract, to abide by the provisions governing grievance and arbitration, as well as payments to the benefit funds. In adopting the ALJ's conclusion with respect to the survivability of the arbitration provision, however, two members of the Board expressly disclaimed reliance on *American Sink Top & Cabinet Co., supra.* Pet. App. 45a-46a n.1.

[5]Judge Norris dissented on this ground, concluding that petitioner's objections to the ALJ's decision did not meet the requirements of the Board's regulations (Pet. App. 34a-41a).

provision did survive the expiration of the contract (*id.* at 20a-29a). The court reasoned that "a hiring hall provision is an essential part of the employee/employer relationship" (*id.* at 25a), through which "construction employee[s] * * * find work * * * [and] establish seniority and entitlement to union benefits" (*id.* at 27a). Accordingly, the court concluded that the provision at issue here constituted a term and condition of employment that survived expiration of the contract and could not be abrogated by petitioner without negotiating a new agreement or bargaining to impasse (*id.* at 21a-23a, 29a).[6]

ARGUMENT

Petitioner does not contest that the court of appeals applied the correct principle in this case — that "those terms and conditions established by [a] contract and governing the employer-employee, as opposed to the employer-union, relationship survive the contract and present the employer with a continuing obligation to apply those terms and conditions" until the parties reach a new agreement or bargain to impasse. *Gordon L. Rayner*, 251 N.L.R.B. 89, 90 (1980), enforced as modified, 665 F.2d 970 (9th Cir. 1982); see Pet. 20, 22; Pet. App. 23a-25a. Rather, petitioner contends (Pet. 21-40) only that the court of appeals erred in its application of that principle to the facts of this case because the hiring hall provision regulated the relationship between petitioner and the Union rather than between petitioner and individual employees.[7]

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[6]Noting that two members of the Board had disclaimed reliance on *American Sink Top & Cabinet Co., supra,* in adopting the ALJ's conclusion with respect to the survivability of the arbitration provision, the court "resolve[d] the case * * * without deciding whether an analogy to arbitration clause survivability is appropriate" (Pet. App. 33a).

[7]The court of appeals relied (Pet. App. 25a-28a) on the principle that hiring hall arrangements setting priorities for the referral and hiring of bargaining unit employees constitute mandatory subjects of bargaining

That contention does not merit review by this Court. As petitioner concedes (Pet. 16), the decision below does not conflict with any decision of this Court or any other court of appeals. Review would be especially inappropriate here because the Board, having determined that petitioner's objections were not timely raised, did not consider the issue on the merits.[8]

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because, by "establish[ing] a system of seniority rights and job priority," they "regulat[e] relations between the employers and employees in the industry involved, and * * * also settle a term or condition of employment." *NLRB* v. *Houston Chapter, Associated General Contractors of America, Inc.*, 349 F.2d 449, 452 (5th Cir. 1965), cert. denied, 382 U.S. 1026 (1966); accord *NLRB* v. *Tom Joyce Floors, Inc*, 353 F.2d 768, 771 (9th Cir. 1965); *Sheeran* v. *American Commercial Lines, Inc.*, 683 F.2d 970, 977 (6th Cir. 1982).

[8]Contrary to petitioner's assumption (Pet. 25-28), the Board has not yet definitively resolved the question whether an arbitration provision survives termination of a contract. Compare *Hilton-Davis Chemical Co.*, 185 N.L.R.B. 241, 242-243 (1970), with *American Sink Top & Cabinet Co.*, 242 N.L.R.B. at 408. The issue is presented in a case currently pending before the Board, *Indiana & Michigan Electric Co.*, No. 25-CA-10549 (argued Dec. 6, 1983). Petitioner's reliance (Pet. 25-28) on the nonsurvivability of union shop clauses is misplaced: unlike such clauses, the validity of a nondiscriminatory hiring hall arrangement is not dependent on an agreement in compliance with the proviso to Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3). See *Local 357, Int'l Bhd. of Teamsters* v. *NLRB*, 365 U.S. 667, 672-675 (1961); see also *NLRB* v. *Houston Chapter, Associated General Contractors of America, Inc.*, 349 F.2d at 452-453.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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